IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 13.

SAVAGE ARMS CORPORATION, *Appellant*,

vs.

THE UNITED STATES, *Appellee*.

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims against appellant.

The case involves the right of appellant, hereinafter called plaintiff, to recover profits on a contract with the United States. The contract was for the manufacture of spare parts for Lewis machine guns. The case concerns but one item—for 440,000 magazines. The contract contained no provision authorizing the Government to cancel it.

After the armistice the Government sent plaintiff a letter requesting it to suspend manufacturing operations as to 298,000 magazines with a view to the negotiation of a modification or settlement contract. Plain-

tiff reached an understanding with officers of the Government that the request should operate as to 142,000 magazines and as to that number complied with the request to suspend. It manufactured and delivered the balance, or 298,000 magazines. Government officials inspected and received them, and paid the full contract price therefor; but later refused to receive the 142,000 magazines as to which operations had been suspended during negotiations.

Plaintiff was at the height of its production and in condition to have performed the entire contract without difficulty. Its profits on the 142,000 uncompleted magazines would have been $284,994 (Findings V and VI, p. 28).

The 298,000 magazines were delivered in strict accord with the contract. The letter requesting suspension recognized the Government's obligations under the contract, and did not repudiate or cancel that contract or justify plaintiff in treating it as a breach. The letter had no effect on or relation to the completed magazines.

The Court refused judgment for plaintiff for the amount of its profits, proceeding on the theory that plaintiff had compromised its right thereto.

The only circumstance suggested as a consideration for the alleged surrender by the plaintiff was a letter written months after the delivery of and payment for the 298,000 magazines, which letter was to be a revision of the original request to suspend "so as to allow the delivery of 298,000 instead of 142,000" (27).

In fact there was no compromise between the parties. No dispute had arisen between them as to the delivery of the 298,000 magazines; that delivery was never ques-

tioned by the United States or by any officer thereof; and there was no ground upon which it could be questioned or upon which a colorable dispute could be founded. There being no actual dispute between the parties and no ground for dispute, there could be no settlement of a dispute and there was no surrender of a right by the United States. Hence there was no consideration to support a compromise.

This Court has held that the findings of fact of the Court of Claims are controlling, and that this Court is not at liberty to refer to the opinion of the Court of Claims "for the purpose of eking out, controlling, or modifying the scope of the findings. Stone v. U. S., 164; U. S., 380, 383; Crocker v. U. S., 240 U. S. 74, 78."

The facts found by the Court of Claims do not justify its judgment, but do require that judgment be entered for plaintiff in the full amount of its profits.

THE FACTS.

Plaintiff is a manufacturing corporation with a factory at Utica, New York, which during the war was devoted to the manufacture of Lewis Machine Guns and spare parts therefor, including magazines (Finding I, p. 22). The contract in suit is dated April 30, 1918, and is known as War Ordinance CMG 48 A (II, 22). A copy is Exhibit A to the petition (5-15, Finding II). There was another contract between the same parties, known as CMG 48. It was for 22,000 Lewis aircraft machine guns, while 48A was for spare parts. In their inception the contracts were negotiated together, but were executed separately (II, 22).

The only item of Contract 48A here involved is 440,000 magazines, the agreed price for which was $4.24

each (II, 23). The contract contained no provision for cancellation on the part of the Government.

The rights and obligations of the parties were plain. Plaintiff was obliged to manufacture and deliver, and the Government to accept and pay for all the magazines.

When the suspension request was received plaintiff was in the midst of performance of its contract, was at the height of its production, and was in condition to have performed its entire contract without difficulty. It did deliver 298,000 magazines, all of which were accepted and received by May 7, 1919, and all of which were paid for by May 21, 1919. Had it been permitted to complete its contract and deliver the remaining 142,000 magazines, it would have made a profit thereon of $284,994 (Findings V, VI, p. 28; Finding IV, p. 25).

In the territorial division of the work of the War Department there was at Rochester, N. Y., an office known as the Rochester District Claims Board. Communications with the Ordnance Office of the War Department apparently were carried on through the Rochester Board. Under date of January 29, 1919, an officer of the Ordnance Office at Washington addressed a polite letter to plaintiff, requesting it to suspend operations under its contract CMG 48 to the extent of 298,000 magazines (Finding IV, p. 23). This is not the contract in suit, but the Court found that plaintiff knew it related to such contract.

The request stated that it was made with a view to the negotiation of a supplemental contract providing for the modification, settlement and adjustment of plaintiff's existing contract. Plaintiff was asked to acknowledge receipt immediately and to indicate its

decision as to compliance with or rejection of the request, and informed that on "notice of compliance a representative of the Ordnance Office would forthwith take up with you the proposed negotiation" (24).

The letter is in the following language (23, 24):

> "1. By direction of the Chief of Ordnance you are requested in the public interest immediately to suspend operations under your contract, or order, with the United States, War-Ord. No. C. M. G. 48, to the extent of 298,000 magazines, together with their spare parts.
>
> "You are also requested, except for the purpose of completing deliveries or in cases of proved necessity, to order no further materials or facilities, enter into no further sub-contracts, make no further commitments, and incur no further expenses in connection with the performance of said contract or order.
>
> "2. This request is made with a view to the negotiation of a supplemental contract providing for the modification, settlement and adjustment of your existing contract or order, in a manner which will permit of a prompt settlement.
>
> "3. Please acknowledge receipt of this notice immediately and indicate your decision as to compliance with or rejection of this request. Upon notice of your compliance, a representative of the Ordnance Department will forthwith take up with you the proposed negotiation."

Instead of sending this letter directly to claimant, it was forwarded to the Rochester Board. Its purport was communicated to plaintiff. An agent of the latter and an official of the Claims Board arrived at an understanding that this letter should operate to the extent of 142,000 magazines instead of 298,000 (24). There-

upon on February 13, 1919, plaintiff wrote the Board acknowledging the latter's letter transmitting the suspension request. Plaintiff said it understood the suspension request as received was not correct, and announced that it awaited a change in the wording of the notice to correspond with the later instructions received at the Utica plant (24).

While the Court below refers indiscriminately to the letter of January 29 as an order, notice, letter and request, it purported to be, and was, and was taken to be a *request* to suspend operations and to negotiate a formal written settlement contract. It was not a notice of intention on the Government's part not to perform and was not a breach of the contract. It was not an order of any kind, and was not a cancellation.

No reply was received to plaintiff's letter of February 13. Plaintiff did suspend operations as to 142,000 magazines. It manufactured and delivered in addition to those theretofore delivered, 273,653, or a total of 298,000 magazines (25).

These magazines were delivered between February 15 and May 7, 1919, and were promptly paid for by the United States, the last payment being made May 21, 1919 (25).

Thus a contract to deliver and to receive 440,000 magazines was completely performed to the extent of 298,000 only. That number was manufactured, delivered, found to accord with the specifications, and paid for. Under the contract the payment could only be made upon the certificate of the inspecting and receiving officer, showing delivery and acceptance (p. 12, par. 3).

To that extent each party to the contract had met its obligations and been accorded its rights. To that ex-

tent the request to suspend was not material. Indeed, had the Government continued to receive and pay for the remaining magazines, the plaintiff would have been not only within its rights, but in the performance of its obligations in continuing to manufacture and deliver to the full extent of 440,000 magazines.

The request to stop work beyond a certain point and to negotiate a settlement contract was a mere invitation from defendant to plaintiff. Unless plaintiff accepted that invitation, it could play no part in the case. And plaintiff might accept it as to the entire amount covered by it or only as to part thereof.

The request to suspend could not of itself affect the contract, nor could it constitute a breach of the contract by the Government. It was clearly not a notification that defendant would not accept further deliveries. The request did not create any obligation whatever on plaintiff's part to comply with it.

But so long as plaintiff continued to manufacture and deliver, it was performing its contract obligations. And so long as the Government continued to receive and pay for the articles, the Government was performing its contract obligations.

The United States made no claim that the delivery was illegal or improvident, or that it was not allowed by the letter of January 29, or that any of the magazines could be charged back to plaintiff. In short, it raised no question, controversy or dispute as to that delivery. And as to that delivery, there was nothing for it to compromise with plaintiff.

The Court then finds:

> "At the time contract 48-A was pending the plaintiff had a large number of contracts with the

> Government, 18 for furnishing magazines, besides contracts for furnishing machine guns, small arms, and other munitions, and numerous accounts relating to such contracts. The plaintiff was therefore anxious to close this contract on its books, particularly so as there was some discussion going on among the ordnance officials in Washington about what had become of the suspension order of January 29, 1919, and a possibility, when the unauthorized changes became known, of charging back 156,000 magazines (the difference between 142,000 and 298,000) against the plaintiff as having been improvidently accepted and paid for."

The Court then quotes a letter dated July 8 to the Secretary of the Rochester Claims Board which calls attention to the fact that there are still due the Government on contract 48-A 142,000 magazines.

As stated in the letter, plaintiff on July 10, filed with the Rochester Board a claim for $181,213.27, alleged to be on account of lost production of magazines due to a change in their design. The letter of July 8 states that this claim will be filed and that if it is allowed the plaintiff will make no claim for any portion of the 142,000 magazines so suspended. The claim for $181,213.27 was disallowed by the Rochester Board and the proposition contained in the letter of July 8 thus came to an end (26).

The Court then continues that after this letter the plaintiff urged the ordnance officials to revise the letter of January 29 "by an order authorizing the delivery of 298,000 magazines" and that on August 20th Mr. Barker wrote a Mr. Horton that there remained undelivered under this contract 142,000 magazines for which no suspension request had been received and he asked that one be sent.

The letter says not a word about the 298,000 magazines and it is not asked that their delivery be "authorized."

The Court then proceeds to its finding of the ultimate fact upon which its conclusion of law is based. It continues:

> "Finally a verbal agreement was arrived at between Mr. Barker, representing the plaintiff, and Mr. Horton, representing the defendant, by which the plaintiff agreed to abandon and settle all claims, controversies, and disputed points growing out of contract 48-A if Mr. Horton would secure a revision of the suspension order of January 29, 1919, so as to allow the delivery of 298,000 magazines instead of 142,000." (27)

This "verbal agreement" is the foundation for the Court's conclusion of law that judgment should go against plaintiff.

The Court continued that as a result of Horton's efforts a letter dated September 12, 1919, signed by Lieut. Col Hawkins of the Ordnance Office was sent plaintiff. This letter is an exact copy of that of January 29, except that the first paragraph requests plaintiff to suspend further operations upon its contract 48-A (instead of 48) "except such operations as may be necessary to complete delivery thereunder of a total (including all deliveries heretofore made) of 298,000 magazines" (27).

The letter then states, in the language of the first letter, that the request is made with a view to the negotiation of a supplemental contract for the settlement and adjustment of the existing contract; plaintiff is requested to acknowledge receipt and indicate its

decision as to compliance with or rejection of the request, and is informed that upon notice of its compliance a representative of the Ordnance Department will forthwith take up with it the proposed negotiation. The letter adds that it supersedes all previous letters of suspension.

As would naturally be expected from this letter, the plaintiff on September 24, 1919, replied acknowledging the receipt of the request last mentioned "substituted for suspension request dated January 29, 1919," and stated that it had suspended work in accordance with the request, reserving, however, all its rights, against the government for failure fully to perform the contract and especially its rights to recover all the profits it would have made upon such completion (28).

Thereafter plaintiff wrote several letters to the Chief of Ordnance inquiring as to the government's intention regarding the remaining 142,000 magazines or the payment of prospective profits on its refusal to accept them. Finally, on November 17, 1919, the Chief of Ordnance replied that the government could not use and would not accept the magazines, and that he was not authorized to pay anticipated profits on them (28). This letter was a peremptory refusal by the defendant to perform the contract.

The gist of the Court's findings of facts is the alleged "verbal agreement." In discussing that agreement the Court proceeds on the theory that plaintiff compromised its rights to the $284,994 profits on 142,000 uncompleted magazines. The only circumstance suggested as a consideration for this compromise is a letter which was to be written months after the delivery

of the 298,000 magazines, which letter was to allow their delivery.

A fundamental prerequisite to a compromise is an actual dispute between the parties made in good faith and based upon reasonable or colorable grounds. To support the supposed compromise, it must appear that the United States actually made some claim against plaintiff with respect to the completed deliveries of the 298,000 magazines; that in good faith the Government believed its claim to be valid, and that it was valid or was based upon reasonable or colorable grounds.

We have quoted the only facts found by the Court bearing on the subject. They do not show that any claim was made by the United States as to the 298,000 magazines.

The finding merely is that some discussion was going on among the ordnance officials in Washington about what had become of the suspension order of January 29. This cannot be distorted into a finding that the ordnance officials honestly believed the deliveries were improper, or that they had made any claim to plaintiff. They were merely inquiring among themselves what had become of the latter.

The only other item in the finding is the alleged "possibility" of charging back some of the magazines against plaintiff as having been improvidently accepted. Whether it was possible to charge back any of these magazines on this ground is purely a question of law. As we show hereafter, upon the ultimate facts found by the Court it was not legally possible to charge any of the magazines back to plaintiff. This language of the Court, dealing with a question of law, is entirely inappropriate to findings of fact.

The discussion going on among the ordnance officials at Washington was not communicated to plaintiff, nor did the officials discuss or consider the "possibility" referred to. It is clear from the facts that no officer of the Government ever regarded as improper the delivery of any part of the 298,000 magazines, and that no officer of the Government ever imagined to himself or presented to plaintiff any claim that the magazines could be charged back, or understood that it had any right or claim to compromise with respect to those magazines or ever understood that it had compromised with plaintiff any such right or claim.

142,000 magazines had been delivered before the end of March. The next 156,000 were delivered between that time and May 7. In all the negotiations and correspondence it is never hinted that the Government believed there was any question about these deliveries or that it had the right to question them or that it had surrendered any such right. When the letter of September 12 was received, plaintiff agreed to suspend, but insisted on its right to profits. The Ordnance Office replied and finally breached the contract, but never made the point that a compromise agreement had been made by which plaintiff had surrendered its right to profits as a consideration for the Government's surrender of a right to question the delivery of any magazines.

ASSIGNMENT OF ERRORS.

The Court below erred:

1. In entering judgment for the defendant and in failing to enter judgment for the plaintiff for the amount of its profits.

2. In holding that the facts found by the Court justified judgment for the defendant.

3. In holding that there was a valid agreement between plaintiff and defendant by which the ~~defendant~~ plaintiff surrendered its right to its anticipated profits, when the facts do not show such valid agreement.

4. In entering judgment for defendant on the theory that a compromise had been made by which the defendant surrendered some right as to the completed deliveries of 298,000 magazines, when in fact there was no actual dispute between the parties as to those deliveries and no ground on which to base a dispute.

ARGUMENT

I. THE COURT BELOW PROCEEDED ON THE THEORY THAT PLAINTIFF LOST ITS RIGHTS TO ANTICIPATED PROFITS UNDER AN AGREEMENT BETWEEN IT AND DEFENDANT BY WHICH THE GOVERNMENT COMPROMISED AND SURRENDERED SOME RIGHT WITH RESPECT TO THE 298,000 MAGAZINES THERETOFORE DELIVERED, ACCEPTED AND PAID FOR.

A BONA FIDE DISPUTED CLAIM IS ESSENTIAL TO A VALID COMPROMISE. THE GOVERNMENT IN FACT MADE NO CLAIM AS TO THE 298,000 MAGAZINES AND HAD NO FOUNDATION FOR ONE.

HENCE IT COMPROMISED NOTHING AND SURRENDERED NOTHING TO PLAINTIFF AND THE ALLEGED AGREEMENT WAS WITHOUT CONSIDERATION.

The findings of fact proceed on the theory that there was a compromise between the parties by which

defendant surrendered to plaintiff something with respect to the magazines which had already been delivered, and plaintiff in turn surrendered its undoubted right to profits aggregating $284,994.

It is an essential condition of a compromise that there be an actual dispute between the parties, and the claim in dispute must be made in good faith and based upon colorable or plausible grounds. In the present case there was never any dispute as to the 298,000 magazines. They had been manufactured and delivered in strict accord with the contract and paid for under its terms. Defendant never questioned the validity or propriety of that performance nor claimed that it could rescind that delivery. If no claim at all was made by defendant, none was made in good faith and based upon colorable or plausible grounds. There was no foundation upon which such a claim could be made as to the magazines already delivered.

Hence as to these magazines, defendant compromised no dispute and there was no consideration for the alleged surrender by plaintiff of its right to $284,994 of profits.

A. THE CASE WAS DECIDED BELOW ON THE THEORY OF A COMPROMISE BY WHICH THE GOVERNMENT SURRENDERED SOME RIGHT WITH RESPECT TO THE 298,000 MAGAZINES.

The gist of the findings on this point is in the following language (Finding IV, p. 27):

> "Finally, a verbal agreement was arrived at between Mr. Barker, representing the plaintiff, and Mr. Horton, representing the defendant, by which the plaintiff agreed to abandon and settle all claims, controversies, and disputed points

growing out of contract 48-A if Mr. Horton would secure a revision of the suspension order of January 29, 1919, so as to allow the delivery of 298,000 magazines instead of 142,000."

Clearly, this is a description of a compromise as a result of which each party was to concede something to the other. Under the contract plaintiff was entitled to deliver the remaining 142,000 magazines or to collect its profits. If it gave up that right, it made a compromise.

B. THERE WAS NO DISPUTE BETWEEN THE PARTIES OVER THE DELIVERY OF THE 298,000 MAGAZINES AND THERE WAS NO FOUNDATION FOR ANY DISPUTE.

1. There was no dispute between the parties as to the performance as to 298,000 magazines. The Government made no claim that it could charge any of them back to plaintiff.

Those magazines had already been delivered in strict accord with the contract and had been paid for. No dispute or controversy had arisen as to their delivery. Defendant did not assert that the delivery was improper, and did not claim the right to charge any of them back to plaintiff.

By May 21, 1919, the rights of the parties as to those magazines were settled, and under the contract itself. Their delivery not only was allowed, but was required by the obligation of the contract.

The letter of January 29 did not disallow, or impede or in any way interfere with their delivery, and defendant never so claimed. No revision of that letter was necessary to or could "allow" their delivery.

The entire finding of the Court on the question of an existing controversy is the following:

> "At the time contract 48-A was pending the plaintiff had a large number of contracts with the Government, 18 for furnishing magazines, besides contracts for furnishing machine guns, small arms, and other munitions, and numerous accounts relating to such contracts. The plaintiff was therefore anxious to close this contract on its books, particularly so as there was some discussion going on among the ordnance officials in Washington about what had become of the suspension order of January 29, 1919, and a possibility, when the unauthorized changes became known, of charging back 156,000 magazines (the difference between 142,000 and 298,000) against the plaintiff as having been improvidently accepted and paid for." (25, 26.)

It is clear that no controversy existed between the parties over the delivery of the 298,000 magazines. There had been first a written request to suspend manufacturing operations as to 298,000; and after discussion a verbal request to suspend as to only 142,000 which was complied with.

Both requests were made in order that the parties might negotiate a formal modification and settlement contract.

Plaintiff had performed as to 298,000 magazines and so had the Government. The extent of the finding is that some officers of the defendant were talking among themselves about what had become of the written request to suspend as to 298,000. From it cannot be spelled out the slightest suggestion that any Government officer questioned the validity of the delivery

of these magazines or made the slightest assertion or claim that delivery was invalid or that any part of the magazines so delivered could or should be charged back to plaintiff.

Neither the letter of July 8 nor the one of August 20 tends to show the existence of a dispute as to the validity or propriety of the delivery of the 298,000 magazines theretofore paid for.

The letter of July 8 was part of an offer that if plaintiff were paid $181,213.27 on account of lost production of magazines, no claim would be made on the undelivered balance, which offer was rejected.

This letter states that 142,000 magazines are due the government on contract 48 A; that by reason of a change in design in the magazines the contractor sustained a substantial loss of profit by reason of lost production; that upon receipt of a suspension request as to 142,000 magazines, plaintiff will accept it without making claim for any portion of the magazines so suspended but will present instead its claim for recovery of the lost profit (26).

On July 10, plaintiff filed with the Rochester Board a claim in entire accord with this letter, stating its claim at the sum of $181,213.27 alleged to be on account of lost production of magazines under both contracts. This claim was disallowed by the board (26).

The claim for lost production being disallowed, the proposition contained in the letter of July 8 came to an end. And naturally when the government later requested plaintiff to suspend, plaintiff reserved its right to profits (28).

This letter of July 8 is examined in vain for any reference to the 298,000 magazines already delivered. The existence of an actual dispute or of the slightest

doubt over the validity or propriety of those deliveries cannot possibly be inferred from any language in this letter.

There is no finding that either the letter of July 8 or the claim for $181,213.27 ever left the Rochester Board, and in fact they played no part in the verbal agreement upon which the court's decision is based.

The letter of August 20, 1919, does not tend to show a dispute as to the delivery of the 298,000 magazines. That letter again states that there remains undelivered on the contract 142,000 magazines, that plaintiff has received and accepted no suspension request for this number, that manufacture was discontinued upon verbal request, and asks that suspension request be sent, and states that plaintiff is anxious to receive and accept suspension request, "otherwise the contract will remain open on our books" (27).

The delivered magazines are not mentioned, and there is nothing in the letter to justify an inference that any dispute had arisen with respect to them.

This letter is forward looking, and deals entirely with the 142,000 magazines undelivered. The reason for a written statement by defendant as to them was plain and was frankly stated.

Work on 142,000 magazines had been suspended pending negotiations for a formal written settlement contract. The request for suspension was in a letter which on its face referred to another contract, and in an understanding which changed the figures in that letter. While this suspension at defendant's request temporarily excused performance on both sides, plaintiff was entitled to know whether defendant would perform or not. If defendant wanted the magazines, plaintiff should complete and deliver them. If de-

fendant did not intend to take the magazines, it should so state in writing, and leave plaintiff to its legal remedies.

If the request when received, should be an absolute refusal to perform, plaintiff could, under the decision of this Court in Roehm v. Horst, 178 U. S., 1, accept that as terminating the contract and leaving plaintiff its right to sue for damages.

But when a written suspension request was finally received by plaintiff, it was in the exact language of the one of January 29. This was not an absolute refusal to perform, but notified plaintiff that negotiations would be had looking to the final settlement of their rights. Plaintiff immediately replied, stating that it had suspended, and that it reserved its rights to profits. Later it inquired whether the Government would receive the magazines, and was finally on November 17, for the first time definitely and positively told that the Government would not perform.

This letter, and only this letter, justified plaintiff in treating the contract as at end, and put it in position where suit could be instituted.

Neither letter of July or August played any part in the compromise upon which the Court based its conclusion. That was made in a verbal agreement between Barker and Horton.

2. Delivery of the 298,000 magazines was valid under the contract and there was no foundation for any claim to the contrary.

The contract obligation was to manufacture and deliver these magazines. This was plaintiff's duty. It was equally defendant's duty if those magazines conformed to the specifications, to accept and pay for them. The performance was completed as to 298,000

magazines. This performance was valid and so far as it went disposed of the contract rights of the parties.

The Court below relied upon the suspension request of January 29. That request made no change in or modification of the contract. It was not a repudiation of the contract or its obligations and did not justify plaintiff in asserting that defendant had committed a breach. It was a mere polite request to suspend operations pending negotiations for a settlement. Even had there been a formal statement by a proper officer of the Government that the defendant would no longer receive the magazines, yet continued receipt and payment for them would constitute a retraction of any such attempted repudiation.

(a) The letter of January 29 was not a repudiation of the contract. It was not "a distinct and unequivocal absolute refusal to perform." It could not be and was not treated by plaintiff as a breach.

A fundamental error of the Court below is its construction of this letter. And its entire opinion is built around this error.

The only fact found is the letter which is incorporated in the findings. The construction of that letter is, of course, a question of law. The Court below, while never expressly construing it, in the opinion puts its whole argument on the assumption that the letter was a cancellation of the contract.

The letter is not capable of such construction, was not so intended by the writer, and was not treated by the plaintiff as a breach.

That the letter is not capable of being construed as a repudiation is clear from a mere reading.

The letter is a courteous request to suspend operations and to incur no further expenses in performance

of the contract, expressly made with a view to the negotiation of a supplemental contract for the modification, settlement and adjustment of the existing contract. It concludes with a statement that upon notice of plaintiff's compliance, a representative of the Government will forthwith take up the proposed negotiation looking to the modification of the contract (23).

It recognizes the binding force of the contract, defendant's obligations thereunder, and shows no intent to avoid those obligations. It is not an unequivocal absolute refusal to perform the contract. Clearly it is not itself a modification of the existing contract. It is not a repudiation of defendant's obligations and would not have justified plaintiff in declaring the contract at an end for breach by defendant.

In Dingley v. Oler, 117 U. S. 490, 503, this Court quoted with approval from Smoot's Case, 15 Wall. 36, the following statement of the rule in Benjamin on Sales, 2nd Ed. Sec. 568:

> "A mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise and must be treated and acted upon as such by the party to whom the promise was made."

Language going no further than that here used has never been held to amount to a repudiation.

In Dingley v. Oler, 117 U. S. 490, both parties were ice dealers. In 1879 Dingley, who had more ice than he could use, tried to sell some of it to Oler at 50c a ton. Finally Oler took several cargoes under an agreement that he would replace them next season. In July

following when ice was worth $5 a ton, Dingley demanded the return of his cargoes. Oler refused immediate delivery, but offered to pay 50c a ton for the ice, or to give the ice to Dingley when the market reached that point. Dingley treated this as a breach and brought suit. He recovered the lowest value of ice in the season of 1880. This Court reversed the case, holding the action of Oler not to be a definite repudiation.

This Court cites several English cases. In Avery v. Bowden, 5 El. & Bl. 714; 6 El. & Bl. 953, the plaintiff sued for breach of a charter party to provide a cargo at Odessa. The ship was at Odessa early in March, 1854; war was declared between England and Russia March 28, 1854, and known in Odessa April 1, 1854. It was contended that the declaration of war terminated the contract. But before March 28 defendant's agent frequently declared that he had no cargo for the ship, but the master remained at Odessa and continued to demand a cargo. Held not a sufficient repudiation to constitute a breach.

In Barrick v. Buba, 2 C. B. (N. S.) 563, with reference to similar facts, it was held that the mere intimation by the agent of the charterer at Odessa to the master before the time for loading had expired that he had ceded the charter party with all its rights and obligations to a third person and that the master must address himself to that person for a cargo did not amount to a renunciation.

In Johnstone v. Milling, 16 Q. B. Div. 460, cited with approval in Dingley v. Oler, the plaintiff leased certain premises to defendant for 21 years and covenanted to rebuild the premises after the expiration

of the first four years upon receipt of a certain notice. Before the expiration of that time plaintiff gave six months' notice terminating the lease. He continued to remain in possession. When sued he counter claimed damages for failure to rebuild. He proved that for the last two years of his tenancy he constantly talked with plaintiff about getting money to rebuild and the plaintiff always told him that he was unable to do so, and for this reason defendant had given the six months' notice of termination of the lease. Unanimously held not a repudiation. Of this case, this Court said in Dingley v. Oler, p. 503:

> "The most recent English case on the subject is that of Johnstone v. Milling, in the Court of Appeal, 16 Q. B. D. 460, decided in January of the present year, which holds that the words or conduct relied on as a breach of the contract by anticipation must amount to a total refusal to perform it, and that does not by itself amount to a breach of the contract unless so acted upon and adopted by the other party."

In Hoggson v. First National Bank, 231 Fed. 869, plaintiffs, architects, contracted to construct for the defendant a new bank and store at a certain price. The architects reached the conclusion that the price would not permit a satisfactory building and wrote the bank urging that more money be spent, and saying they would prefer not to do the work if the bank insisted on keeping the price within the limit. The bank wrote treating this as a repudiation by the architects who replied that they were anxious and willing to perform the contract at the original price. The Court held this not a repudiation, saying (872):

> "The law seems to be settled that a refusal to fulfill a contract must be absolute to be equivalent to an assent to its dissolution, and to authorize the other party to rescind it; such refusal must be in no way qualified, and should substantially amount to an avowed determination of the party not to abide by the contract."

In Pels Co. v. Saxony Spinning Co., 287 Fed. 282, after many complaints, the seller wrote the buyer expressing surprise at the buyer's request for further shipments and concluded:

> "When you satisfy us beyond any question of a doubt that you will take in the yarns and make satisfactory arrangement with us for the yarn, we will talk to you further about making further shipments."

Held not a repudiation.

In New England Oil Corporation v. Island Oil Marketing Corp., 288 Fed. 961, plaintiff's letter ~~mistaking~~ its rights under the contract, held not an anticipatory breach.

In National Wholesale Grocery Company v. Garcia, 295 Fed. 128, the suit was for breach of contract for the purchase of a carload of prunes. Defendant refused to receive the prunes when shipped to it. It alleged that it had repudiated the contract before time for performance and that it could be held liable for damages only for the difference between the contract price and the market price at the time of repudiation.

The first letter relied on stated that defendant was absolutely unable to take delivery on the contract "and was to request you to cancel same." Plaintiff replied that it must insist upon the performance of

the contract. Defendant replied "we cannot make use of the prunes and we must insist on cancellation." The case went to the jury which proceeded on the theory that defendant did not intend to repudiate the contract but to seek cancellation of it by consent and release from damages. The Court of Appeals held that this was the proper construction of the correspondence.

In Daily v. People's Building Association, 178 Mass. 13, 18, Mr. Justice Holmes held that a statement by the Building Association to Daily that his stock was forfeited because he was six months in arrears, when in fact his arrearage was slightly less than six months, was not a repudiation and did not justify Daily in rescinding and suing for the money paid in.

In Ollinger & Bruce Drydock Co. v. Gibbony, 202 Ala. 516, a request by Gibbony to the Drydock Co. not to further proceed with repairs to a barge until he had been consulted was held not a breach.

The letter of January 29 is a clear recognition of defendant's obligations under the contract. It is not a repudiation of the contract.

The writer of the letter did not intend it as a cancellation.

The instructions given on November 9, 1918, by the War Department to the appropriate officers in Supply Circular No. 111, copy of which is printed herewith, positively instructed the officers not to give notice of cancellation. This regulation will be judicially noticed. U. S. v. Caha, 152 U. S. 211, 222; Cosmos Co. v. Gray Eagle Co., 190 U. S. 301, 309.

The reason was that if notice of cancellation were given, the contracting officer of the Government lost

power to enter into a supplemental agreement with the contractor.

This statement of the law is undoubtedly based upon the decision of this Court in Cramp v. U. S., 216 U. S. 494, 500, where it is held that executive officers of the Government are not authorized to settle claims for unliquidated damages.

The War Department expressly states:

> "The contractor shall be requested to suspend work." (Par. 3, 4.)

If thereafter an agreement is reached on just and reasonable compensation by reason of the suspension and termination of the contract, that agreement is to be embodied in a supplemental agreement which requires approval of the Board of Contract Review.

The letter of January 29 is consistent only with a strict compliance with these instructions, and is entirely inconsistent with an attempt at cancellation or repudiation. And the writer's conduct is consistent only with such instruction. Had he intended to cancel or breach the contract, he would, of course, have notified the inspecting, receiving and disbursing officers that they were not to perform the contract as to more than 142,000.

None of the officers of the Government charged with the performance of the contract treated the letter as a cancellation or repudiation. They continued to inspect, receive and pay for the magazines.

The plaintiff did not treat and act upon the letter as an absolute refusal by the defendant to perform. Had it done so it would have notified the Government that the contract was terminated and ended upon the

performance as to 142,000. But it continued to manufacture and deliver magazines beyond that number and to the number of 298,000, and as to the remaining number it merely complied with the request to suspend manufacture and to negotiate a settlement contract.

(b) Even had the letter of January 29 been capable of being construed as a repudiation, the subsequent receipt of and payment for the magazines was a retraction thereof and performance of the contract.

Clearly plaintiff did not treat the letter as a repudiation but continued to deliver magazines to the extent of 298,000. Even had the language been sufficient to constitute a repudiation, plaintiff was not bound to so treat it. The subsequent receipt of and payment for the magazines by defendant constituted a performance of the contract.

As said by Lord Justice Bowen in Johnstone v. Milling, 17 Q. B. Div. 467, 472, and quoted by this Court with approval in Roehm v. Horst, 178 U. S. 1, 13:

> "The promisee when confronted with the declaration of intention by the promisor not to carry out the contract, may treat the declaration as *brutum fulmen* and hold fast to the contract."

In Frost v. Knight, L. R. 7, Ex. 111, Cockburn, C. J., said, also quoted with approval by this Court in Roehm v. Horst, p. 11:

> "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other

> party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it."

Professor Williston thus states the law:

> "If in spite of the buyer's countermand the seller tenders the goods, an acceptance of them, or even a recognition of the contract by taking the goods into his possession, will be an assent to the disregard of the countermand." 2 Williston Contracts, Sec. 1299, p. 2350.

In Trinidad Asphalt Manufacturing Co. v. Buckstaff Bros. Mfg. Co., 86 Neb. 623, the defendant, Buckstaff Bros. Co., ordered certain roofing from plaintiff and later countermanded the order. Notwithstanding, plaintiff shipped the roofing. An official of defendant, after being notified by the railroad company of the arrival of the goods, went to the station, opened a roll and cut off a piece of the roofing, which he took to his store and tested. The Court held that as a matter of law the defendant recognized the contract as still existing by this act, and that the rights of the parties then became the same as if the countermand had never been attempted.

In Hines Lumber Company v. Alley, 73 Fed. 603, 607, after the repudiation there was what Mr. Justice Lurton refers to as an "effort to induce a recantation," which came to nothing.

In Laroe v. Sugar Leaf Dairy Co., 180 N. Y. 367, plaintiff sued for balance due for the sale of milk

over a six months' period, and defendant denied the contract and pleaded payment in full. Plaintiff testified to making the contract with defendant's secretary. Thereafter defendant's president repudiated this contract, and informed plaintiff that the milk if delivered would be paid for at last year's prices. Plaintiff insisted that the contract was valid and the milk must be paid for at the new rate, and that any checks sent would be applied on account. Plaintiff continued to perform, and defendant to receive the milk notwithstanding its repudiation. Defendant sent monthly checks at the old rate together with statements which contained at the bottom "to check in full."

Cullen, Ch. J. (371):

> "The defendant repudiated that contract and it may very well be that after the repudiation of the contract, it was not necessary for the plaintiffs to continue to tender performance. Notwithstanding they were justified in carrying out the contract on their part, and it does not militate against them that they adopted that course."

In Barber Milling Co. v. Leichthammer Baking Co., 273 Pa. 9, 27 A. L. R. 1227, the Baking Company repudiated its contract to buy flour, which plaintiff shipped nevertheless. The court said that the vendee could have recalled his unaccepted cancellation at any time within the term of the contract. The Court quoted from a similar earlier case.

> "The notice of an intention not to perform the contract, if not accepted by the other party as a present breach, remains only a matter of intention, and may be withdrawn at any time before the performance is in fact due."

In Carlisle v. Green (Tex.), 131 S. W. 1140, Green agreed to sell land to Carlisle, who later stated positively that he would not perform. Green replied that he would "hold him to it." On the last day on which performance could be made, Carlisle was ready and willing to perform, but Green tendered performance which varied from the contract. Held that since Carlisle had repented of his refusal by being ready to perform, there was a breach on Green's part.

C. THE EXISTENCE OF AN ACTUAL BONA FIDE DISPUTE BETWEEN THE PARTIES AS TO DEFENDANT'S RIGHTS WITH RESPECT TO THE 298,000 MAGAZINES WAS ESSENTIAL TO A COMPROMISE OF THESE RIGHTS.

1. *There must be an actual dispute before there can be a compromise or accord and satisfaction.*

In Fire Ins. Assn. v. Wickham, 141 U. S. 564, 577, this Court said:

> "The rule is well established that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue.
>
> If there be a bona fide dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void."

In City of San Juan v. St. John's Gas Co., 195 U. S. 510, 522, the Court said:

> "The rule in question is subject, among others, to the well established exception that it does not apply where, at the time of the agreement, there was a dispute between the parties, the subject matter of which dispute is embraced in the agreement to extinguish a greater by a less amount. True it is, as pointed out in Fire Ins. Assn. v. Wickham, 141 U. S. 564, it must appear that the alleged dispute really existed and did not arise merely from an arbitrary denial by one party of an obligation which was obviously due."

In Sims v. Three States Lumber Co., 135 Fed. 1019, Mr. Justice Van Devanter, sitting in the Circuit Court of Appeals said:

> "While the evidence is conflicting, it preponderates against the contention, and brings the case within the rule that, where there is a bona fide dispute as to the amount due upon a demand, the acceptance, in satisfaction of the entire demand, of a less sum than is claimed is supported by a sufficient consideration and precludes a recovery of the balance."

In Kiefer Oil & Gas Co. v. McDougal, 229 F. 933, 938, the court quotes Parsons on Contracts (9th Ed.) 477,

> "It is enough if there be an actual controversy, of which the issue may fairly be considered by both parties as doubtful."

In Harrison v. Henderson (Kan.), 62 L. R. A. 760, 762, it is said:

"An accord is an agreement, an adjustment, a settlement of former difficulty, and presupposes a difference, a disagreement as to what is right."

In Silander v. Gronna, 15 N. D. 552, plaintiff Silander had agreed to sell his homestead to Gronna, but the agreement was void because his wife did not sign it. Nevertheless Silander agreed to pay Gronna $75 in consideration of a release from all liability under and cancellation of that agreement. The trial court held there was no consideration for this promise, and Gronna appealed on findings of fact. The Supreme Court of the State held that the findings did not show that there was a compromise of a disputed question actually and in good faith existing between the parties, and therefore there was no consideration.

"There is nothing in the finding from which a conclusion that there was a dispute between the parties can be drawn.

"That there must be a bona fide dispute as to some question before the principles of law pertaining to compromise become applicable is well settled." (Citing cases.)

"A compromise can be made as a matter of law only when the parties disagree among themselves as to their respective rights. A promise to pay a certain sum as a release of a contract is not necessarily a compromise of a disputed right or question. It does not signify that the promise was made after the parties had yielded a part of their claims and mutually agreed that payment of that sum was agreed as a settlement of the dispute * * * The finding does not say that the parties considered that there was any dispute or doubt as to their respective rights under the contract * * *."

Demars v. Musser Sauntry Co., 37 Minn. 418, was an action to recover for work performed in a logging camp. Defense that defendant gave plaintiff a due bill for a certain sum which plaintiff accepted in full settlement of his claim. The trial court held there was no consideration for the alleged settlement:

> "The defendant is entirely right in his law that the compromise of a disputed or doubtful claim is in itself a good consideration, and that no investigation into the character or value of the claims submitted will be gone into for the purpose of setting aside a promise honestly made. It is sufficient that the parties entering into it thought at the time that there was a dispute between them. It is not even necessary that the question in dispute should be really doubtful if the parties bona fide considered it so. The real consideration which each party receives under a compromise is not the sacrifice of the right but the settlement of the dispute.
>
> "But on the other hand it is equally true that to constitute a good consideration for a settlement by way of compromise there must have been an actual bona fide difference or dispute between the parties as to their rights. There is an entire absence of evidence in this case tending to show any such dispute * * *.
>
> "A person cannot create a dispute sufficient as a consideration for a compromise by a mere refusal to pay an undisputed claim. That would be extortion and not compromise. There must in fact be a dispute or doubt as to the rights of the parties honestly entertained. The evidence of this is utterly wanting in this case."

In Isaacs v. Wishnick, 136 Minn. 317, it is said:

"A compromise is a contract, and like any other contract requires a consideration.

"In order that there may be a valid compromise there must be a bona fide dispute as to the rights of the parties, and to give the agreement a consideration there must be a mutual concession. If there is, then payment of the amount agreed upon will constitute an accord and satisfaction of the original claim. But here the debtor paid only what he admitted to be due."

U. S. Mortgage Co. v. Henderson, 111 Ind. 24, 37:

"In order that a compromise may constitute a sufficient consideration for the enforcement of an executory contract, there must have been an actual bona fide claim, founded upon a colorable right, about which there was room for honest doubt and actual dispute."

12 C. J. 316 states the rule:

"Conflicting claims are essential to the validity of a compromise, one of its essential elements being the existence of a bona fide dispute or controversy between the parties."

2. The dispute must be made in good faith and based at least upon colorable grounds.

This is apparent from the foregoing decisions.

In Gunning v. Royal, 59 Miss. 45, appellant hired a mare and driver from appellee; the mare was killed through the driver's negligence. The owner made a claim against appellant, who gave a note for part of the claim. Held no consideration for the note.

"The existence of a dispute or controversy between the parties is not a sufficient consideration to support a promise to pay money in settlement of it where no valid demand for anything whatever exists in favor of the promisee. There must be a valid demand, to some extent, or for something, to uphold a promise of this kind."

Melcher v. Ins. Co., 97 Maine 512, 517:

"The claim must be one that is made in good faith with a belief by the claimant that there is some chance of its successful enforcement. The surrender of a mere groundless claim which is known by both parties to be unenforcable is not a sufficient consideration."

In Jarvis v. Sutton, 3 Ind. 289, it was held that the transaction between the parties amounted only to a lease of a farm; and that an agreement to deliver crops to the lessee in consideration that he release his rights under an alleged contract of sale was without consideration.

"Neither does the evidence show that there was any compromise which would be a sufficient consideration. It is true a compromise of doubtful claims may be sufficient to found a consideration upon but in such cases there must be a surrender of some legal benefit which the other party might have retained.

"In other words, there must be some consideration for a compromise as well as for any other contract if it is executory and remains to be enforced. A promise to give something for the compromise of a claim about which there is merely a dispute and controversy, and for which there is no legal foundation whatever is not sufficient to sustain a suit at law.

D. THE GOVERNMENT HAVING ASSERTED NO RIGHT AND THERE BEING NO ACTUAL DISPUTE BETWEEN IT AND THE PLAINTIFF AND NO VALID GROUND UPON WHICH ONE COULD BE BASED, THERE WAS NOTHING TO COMPROMISE AND NO CONSIDERATION FOR PLAINTIFF'S ALLEGED SURRENDER OF ITS PROFITS OF $284,994.

This necessarily follows from the foregoing discussion.

The court finds Mr. Horton was to secure the revision of the letter of January 29 "so as to allow the delivery of 298,000 magazines instead of 142,000." This is the only circumstance suggested as a consideration for the alleged surrender of plaintiff's profits.

As to the delivered magazines, to quote from Silander v. Gronna, *supra*, "there is nothing in the findings from which a conclusion that there was a dispute between the parties can be drawn." Not only was there no dispute but there was no ground on which a dispute could be based. The 298,000 magazines had been properly delivered and paid for under the contract. As to that delivery, no question had been raised and there was no foundation on which to raise any question. The letter of January 29, a mere request, could not affect in any degree rights established by the contract; such a right of plaintiff was to deliver and receive payment for magazines up to the total number specified in the contract. It follows that no revision of the letter of January 29 could allow or was needed to allow their delivery. The conclusion of law of the Court below, therefore, is not supported by the facts. There was nothing for the Government to compromise, and therefore there was no consideration for the alleged surrender by plaintiff of its right to its anticipated profits.

II. THE COURT IN ITS OPINION RELIES ON AN "ELEMENTARY" PROPOSITION OF LAW WHICH IS NOT APPLICABLE TO THE FACTS FOUND AND IS NOT SUPPORTED BY THE WEIGHT OF AUTHORITY.

As we have shown, the Court assumes that the parties entered into a compromise in August or September, 1919, by which plaintiff surrendered its right to its profits of $284,994, but under which the United States surrendered nothing.

In its opinion (32, 33) the Court, misled by its fundamental error misconstruing the letter of January 29, argues that the letter of January 29 was a cancellation as to 298,000 magazines; and states that it is elementary law that where there is such a cancellation or repudiation the parties may without new consideration negotiate a modification agreement by which one agrees to take less than the original number and the other agrees to surrender his rights as to the part not performed.

It is clear that the Court uses the word "cancelled" as meaning breached with the right to the injured party to sue for damages, and not as meaning a rescission bringing the contract to an end without further right or remedy in either party.

This opinion is not part of the case to be considered by this Court. The only question is whether the judgment is supported by the facts actually found by the Court of Claims. Crocker v. U. S. 240 U. S. 74, 78.

The so-called elementary proposition of law relied on by the Court is not applicable to the facts found by it. There was in fact neither a cancellation of any

part of the original contract, nor was there a modification thereof.

It is then immaterial whether their proposition is correct or not. But that proposition is opposed to the great weight of authority. Upon the facts of this case actually found by the Court, even had there been in fact a modified agreement, it was not supported by any consideration either that suggested by the Court nor any other.

A. THERE WAS NO CANCELLATION OR BREACH OF THE CONTRACT UNTIL THE GOVERNMENT'S LETTER OF NOVEMBER 17, 1919.

The Court's conclusion of law is predicated on its initial and fundamental error construing the letter of January 29.

That letter, as we have shown, was not a cancellation or repudiation of the contract. It was a mere request to suspend partial performance pending negotiations for settlement. The understanding that this request should operate to the extent of 142,000 instead of 298,000 magazines (p. 24) means only that the one figure was substituted for the other. No other change was made, and the letter was still but a polite request to suspend work. The only effect of a compliance with the request was temporarily to excuse performance as to the 142,000 magazines pending negotiations.

That the writer of the letter of January 29 did not intend it as a cancellation is clear. This Court in Cramp v. U. S., 216 U. S. 494, approving the long-continued practice of the departments, held that executive officers were without authority to negotiate the

settlement of a contract after it was breached. All Government contracting officers were notified of this state of the law by the instructions of November 9 before mentioned (Ex. A, this brief).

These instructions expressly forbade the contracting officer to give notice of cancellation and instructed him to request the contractor to suspend work in whole or in part, pending negotiations; and that when these negotiations had resulted in an understanding they should be embodied in supplemental contract which should set forth "that it constitutes full and final settlement of all questions and claims growing out of the original contract or order" (par. 6). This is in accord with Art. 560 of the Army Regulations (Ed. 19 B, p. 122), which requires contracts with corporations to be signed by a properly authorized officer thereof.

One attempting to sustain the argument of the Court is in a dilemma.

There either was or there was not a cancellation of the contract.

If there was a cancellation, none of the executive officers, from highest to the lowest, had power to negotiate a settlement contract, and they were so informed, and there could have been no valid modification agreement.

If there was no cancellation, then under none of the authorities hereafter cited, would the continued performance by the Government, or its promise to perform its obligations under the original contract be consideration for a surrender by the plaintiff of any of its rights thereunder.

The revised letter of September 12 made no change in the letter of January 29, except to substitute the

figures 142,000 for 298,000. Otherwise, it was the same polite request to suspend manufacturing operations and to negotiate a settlement. Like the original request, it was not a cancellation or repudiation of any part of the contract. Not only was it not a modification, but it expressly pointed out that the modification agreement, if any were made, was to be made in the future after negotiations.

Upon receipt of this letter plaintiff replied that it had suspended as requested and reserved all rights and especially its rights to recover profits (28).

Plaintiff wrote several other letters making inquiry as to the intention of the Government regarding the delivery of the remaining 142,000 magazines or the payment of prospective profits. On November 17, 1919, the Chief of Ordnance replied that the Government would not accept delivery of the magazines (28). The correspondence clearly shows that the officers of the Government prior to this time did not think that they had canceled or breached the contract. That letter was the first repudiation or breach.

B. Contract 48A Was Never Modified by Agreement of the Parties That 298,000 Magazines Should be Accepted in Full Performance.

Nowhere in the findings of fact is it stated that the parties or any of their employees agreed that the contract should be reduced from one for 440,000 to one for 298,000.

The only language in any way dealing with the subject occurs on page 24. There, after finding that the letter of January 29 was issued from Washington, the Court continued:

"This notice was forwarded to the Rochester District Claims Board for delivery to plaintiff, and its purport having been communicated to plaintiff, an agent of the latter entered into verbal negotiations with an official of the claims board relative to the same. An understanding was arrived at between this agent and official to the effect that the order of suspension should operate to the extent of 142,000 magazines instead of the 298,000 stated in the notice. Thereupon plaintiff wrote under date of February 13, 1919, to the secretary of the said District Claims Board."

The substance of this is that after the receipt of the letter there were verbal negotiations at Rochester which resulted in an understanding that the letter should operate to the extent of only 142,000 magazines. This means only that the parties understood that the figures "142,000" had been substituted in the letter for "298,000." There is no finding that plaintiff promised or agreed to do anything. All plaintiff did was to write a letter of February 13 and state that it understood the letter of January 29 was not correct and that plaintiff awaited a change in the wording of the notice.

These findings are not susceptible of the construction that the parties agreed at that time to reduce the quantity to be delivered under the contract to 298,000 magazines.

C. Performance or a Promise to Perform One's Contract Obligations Does Not Constitute Consideration for a New Promise by the Other Party to That Contract.

The Court below contends that if a party to a contract informs the other side that he will no longer per-

form his obligations under the contract (which is clearly the sense in which they use the word "canceled"), a promise by that person to do only what he is obligated by the existing contract to do, is consideration.

The law on this subject is accurately and suscinctly stated by Professor Williston in his recent work on Contracts:

> "Performance or promise to perform any obligation previously existing under a contract with the promisee is not valid consideration.
>
> "Where A and B have entered into a bilateral agreement, it not infrequently happens that one of the parties, becoming dissatisfied with the contract, refuses to perform or to continue performance unless a larger compensation than that provided in the original agreement is promised him. Especially common is the situation where a builder or contractor undertakes work in return for a promised price and afterwards finding the contract unprofitable, refuses to fulfil his agreement but is induced to fulfil it by the promise of added compensation. On principle the second agreement is invalid for the performance by the recalcitrant contractor is no legal detriment to him whether actually given or promised, since, at the time the second agreement was entered into, he was already bound to do the work; nor is the performance under the second agreement a legal benefit to the promisor since he was already entitled to have the work done. In such situations and others identical in principle, the great weight of authority supports this conclusion. In a few jurisdictions a contrary view has prevailed." 1 Williston Contracts, Sec. 130.

The numerous cases cited by him fully support his summary of the law. Among the leading cases are:

Stilk v. Myrick, 2 Camp. 317.
Alaska Packers Assoc. v. Domenico, 117 Fed. 99.
Frankfurt-Barnett Co. v. Prym Co., 237 Fed. 21.
Davis v. Morgan, 117 Ga. 504, 61 L. R. A. 148 (Opinion by Mr. Justice Lamar, later of this Court).
Vanderbilt v. Schreyer, 91 N. Y. 392.

The contrary view is quite fully discussed by Professor Williston in section 130a. There he shows the unsoundness of the reasoning of the courts of the few states in which the majority rule is not followed.

D. There Was no Other Consideration to Plaintiff to Support a Modification of the Contract to Accept 298,000 Instead of 440,000 Magazines.

We have shown that there was no breach or cancellation until November 17. The Court's discussion of this proposition proceeds on assumptions totally different from the facts which it has found.

The contract was not cancelled in January or February of 1919. The plaintiff did not, therefore, negotiate for the delivery and acceptance of a less quantity than 440,000 magazines, but merely complied with the request to temporarily suspend work on 142,000 magazines. This was no modification of the contract. The contract could not be modified by the defendant's order alone.

The partial performance by both sides did not change their position. That performance was proper and was made under the contract.

The very language used by the Court implies that the contractor as well as the Government must be released from some obligation. There must be mutual concessions, each constituting consideration for the agreement of the other.

In order to support such an agreement, the plaintiff must be released permanently by a valid agreement from further obligation to perform the remainder of the contract.

The Court's findings are examined in vain for any release by agreement from the plaintiff's obligations to deliver the remaining 142,000 magazines.

The instructions of the Secretary of War before mentioned explicitly provide that any such release should be embodied in a formal supplemental contract. True, the breach on November 19 did excuse plaintiff of further obligation to perform. But relief by breach of a contract is not a modification by agreement. It is simply the wrongful act by one party.

The letter of January 29 contained no release as to the 142,000 magazines. The Rochester officials had no authority to release plaintiff and there is no finding that they attempted to do so.

The Court seems to consider that the modification is to be found in the letter of September 12. But that letter contained no release to plaintiff of its obligation to furnish the remaining 142,000 magazines. Like its predecessor it merely temporarily excused performance pending negotiation of the settlement contract. Until the settlement contract was actually made, the Government was at liberty to withdraw its request to suspend and to demand full performance as to the remaining 142,000 magazines.

This right remained until the repudiation by the Government, which occurred in the letter of November 17.

There being no release by agreement of the Government's rights to demand complete performance as to the 142,000 magazines, there was no consideration to the plaintiff to release the Government from its obligation to purchase those magazines.

It follows, therefore, that the principle stated in the opinion is not applicable to the facts found. There was not found in the facts a valid agreement to modify the contract by accepting performance as to 298,000 magazines and each of the parties releasing its rights as to remainder.

CONCLUSION.

We have shown that there was no dispute between the parties as to the validity or propriety of the performance of the contract as to the 298,000 magazines delivered and paid for and that there was no foundation upon which any such dispute could be based.

The verbal agreement found in the facts and upon which the Court below based its conclusion of law, therefore, is invalid because there was no consideration to support it.

This harmonizes perfectly with the subsequent conduct of both plaintiff and defendant which undoubtedly shows that neither one had the slightest inkling that any compromise valid or otherwise had been reached between them.

Plaintiff in acknowledging the request to suspend of September 12 stated that it had suspended as to the 142,000 magazines but reserved its right to profits.

Thereafter it several times wrote and pointedly inquired whether defendant intended to receive the 142,000 magazines or to pay its profits thereon.

Had there been a compromise and settlement, the ordnance officer would have replied that there was no longer any obligation on the Government's part to take the 142,000 magazines and that plaintiff had compromised its right to profits thereon. But they did not mention this compromise. Instead the officer replied that the Government would not take the magazines and that "he was not authorized to pay anticipated profits." This was not a denial of liability on the contract, but merely a statement of the holding in Cramp v. U. S., *supra*.

It cannot be lightly assumed that the Ordnance officers who had made an important agreement relieving the Government of a substantial claim for damages were unfamiliar with everything that had been done in connection with it. The only other conclusion to be drawn from their actions and letters is that there was no such agreement in effect.

And it cannot be lightly assumed that had the ordnance officers made a compromise and settlement with plaintiff, they would have failed to obey their instructions to embody it in a formal written supplemental contract which would forever put at rest the rights of the parties under the contract in suit.

The inescapable conclusion is that this agreement never appeared to anybody until the case reached the Court of Claims.

It is respectfully submitted that the judgment appealed from should be reversed with directions to enter judgment on the findings of fact for plaintiff for its profits of $284,994.

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September, 1924.

APPENDIX A.

WAR DEPARTMENT,

PURCHASE, STORAGE AND TRAFFIC DIVISION,

GENERAL STAFF.

SUPPLY CIRCULAR
No. 111.

Washington, November 9, 1918.

Subject: TERMINATION OF CONTRACTS AND ORDERS IN PUBLIC INTEREST.

1. Whenever the appropriate officers of the Government determine that it is necessary, in the public interest, to terminate, in whole or in part, a contract or a purchase or procurement order for materials or supplies, such termination shall be effected as herein directed.

2. Whenever such contract or order expressly provides that it may be terminated in the public interest, termination may be effected only in accordance with such provisions, unless it shall be in the public interest to terminate it in accordance with the provisions of this circular and the parties shall agree thereto.

3. Whenever such contract or order does not expressly provide that it may be terminated in the public interest, the contractor, if the public interest so requires, shall be requested to suspend work thereunder, in whole or in part and to supply promptly a report under oath showing in detail the following information in so far as applicable:

(1) Raw materials on hand: Cost plus inward handling charges plus such portion of overhead as is directly applicable.

(2) Partly finished products on hand: Cost of raw material and labor, plus such portion of overhead as is directly applicable.

(3) Finished products on hand: Contract price, less freight charges if the contract or order specifies delivery at point other than factory.

(4) Special facilities: Cost of facilities specially provided and paid for by the contractor for the performance of the contract, the necessity of which was contemplated at the time the bargain was made and the cost of which was included in the contractor's original estimate. From the cost of such facilities deduct their fair value at the time the contract or order is terminated and state such portion of the remainder as is represented by the ratio of the uncompleted portion to the whole contract or order.

(5) Commitments: The contractor's commitments to suppliers, subcontractors, and others for contributing materials or work, to be determined, in so far as applicable, in the same manner as indicated in (1), (2), (3), and (4).

If the contractor claims additional compensation by reason of any other item or items, he may add such item or items, together with a detailed statement of the facts on which his claim is based.

(4) Unless otherwise directed by the chief of the bureau, the contractor shall be requested to suspend work and shall not be given notice of cancellation. If a notice of cancellation is given, the contracting officer

of the Government loses his power to enter into a supplemental agreement with the contractor.

5. No allowance will be made for prospective profits, provided, however, that with the consent of the chief of the bureau an allowance of not more than 10 per cent of the cost of partly finished products on hand may be allowed.

6. If agreement is reached on a just and reasonable compensation to be paid to the contractor by reason of the suspension and termination of the contract or order, such agreement shall be embodied in a supplemental contract which shall set forth the agreed compensation and shall provide in specific terms that it constitutes full and final settlement of all questions and claims growing out of the original contract or order. Such supplemental contract shall also provide that all raw materials, partly finished products, and finished products on hand shall become the property of the United States, unless and to the extent that the parties agree that such materials and products shall remain the property of the contractor in which event the Government shall be credited with the agreed value of the same.

7. Each such supplemental contract shall provide that it shall not become a valid and binding obligation of the United States until it has first been approved by the Board of Contract Review of the supply bureau affected.

8. The chief of the bureau may direct that no such supplemental contract, or no such supplemental contract providing for payment in excess of a specified sum, shall be executed by the contracting officer unless first approved by the chief of the bureau.

9. Attention is directed to General Order No. 103, November 6, 1918, creating the Board of Contract Adjustment and empowering such board to hear and determine all claims, doubts, and disputes, including all questions of performance and nonperformance, which may arise under any contractor and the contracting officer have been unable to agree.

10. This circular applies solely to the termination of contracts or orders, in whole or in part, in the public interest and does not affect the right of the Government to cancel a contract or order by reason of the contractor's default, which subject is left to be determined by the provisions, if any, of the contract or order and the principles of law applicable thereto.

By Authority of the Secretary of War:

GEO. W. GOETHALS,
Major General, Assistant Chief of Staff,
Director of Purchase, Storage and Traffic.